REMARKS

Claims 26-35, 37, 40-46 and 94 are pending in this application. Claims 26-35, 37, 40-46 and 94 are rejected.

Rejection Under 35 U.S.C. § 103(a) of Claims 26-35, 37, 40-46, and 94

The Examiner rejects **claims 26-35, 37, 40-46, and 94** under 35 U.S.C. § 103(a) as unpatentable over Garry (*Making Space Management Work*) in view of Landvater (U.S. 6,609,101).

Discussion of Garry article

Garry's article reports a long-felt need for effective grocery store shelf planning. For instance, the long felt need it apparent on page 2, in the item labelled "1" by the

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The systems are credited with taking the guesswork out of stocking,
improving communications between stores and headquarters or brokers,
and
laying the groundwork for computer-aided ordering.

The big clamor now is over the need for planograms tailored to
specific
stores. It's not enough, argue some, to generate a generic planogram
for
all the stores in a chain. To be effective, planograms need to reflect
a
specific store's sales movement and demographic idiosyncrasies.
The problem with store-specific planograms is the time and labor
necessary
to generate them. Lynne Fancher, director of marketing communications
for
MarketWare, Cambridge, Mass.-based marketers of Pegman software, says
the
need to do these planograms will force retailers to make the
investment in
more personnel. Retailers seem to agree, though some don't feel they
are
necessary.
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Examiner:

In addition to long felt need, this passage indicates a disadvantage of existing systems that require an "investment in more personnel" to prepare store-specific planograms, with a consequent reluctance of some retailers to proceed. This passage does not recognize the problem of planning for stores that have different floor plans.

The example of Big Y Foods shows just how cumbersome the maintenance of planograms for specific stores was, using the technology reported by Garry:

Maintaining "about 3,000" store-specific planograms for 28 grocery stores is an example of why retailers were reluctant to use the technology described by Garry. The details of how Muzyka and his two assistants approached this manual task are described on page 4, with a call-out of Apollo's planogram software:

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Big Y Foods: Planogramming specific stores

Many people will tell you that space management works best when you're
managing the selling space of specific stores, rather than concocting
general schematics for all the stores in a chain. These days, after
all, no
two stores are really the same.

Gary Muzyka knows that. Muzyka, who has directed Big Y Foods' space
management department since its inception four years ago, creates
store-specific planograms of 150 product categories for 17 of the
chain's
28 stores; eventually, all 28 stores will get their own planograms.
Right
now, he's maintaining about 3,000 planograms. Muzyka has been creating
store-specific planograms for about a year.
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The process is a manual layout process, supported by the Apollo software, as Garry describes it, still on page 4:

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How does Muzyka do it? He starts by creating a master planogram for
each
category. (That master is still used by the 11 stores that have yet to
get
store-specific planograms.) Incorporating average product movement
across
the chain, the master is created by the Apollo space management
system.
Then Muzyka hands the master planogram over to one of his two
assistants,
who modifies it for a specific store, using the store's own product
movements. The assistants use 16 or 32 weeks worth of a store's
movement
data gathered at the point-of-sale and stored in Big Y's mainframe
computer.

The key is obtaining the specific store's sales movement from the
mainframe
in a timely fashion. Depending on an MIS department to supply the data
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So Myzyka designed a program that can pull average weekly store
movement
for 200 products from the mainframe in about 12 minutes and put it in
a
separate database. From there, Muzyka uses the Apollo system to
create individual store planograms.

Each planogram is reviewed at least once a year, some six to eight
times
per year. Generally planograms are revised as a result of items being
added
or discontinued. However, Muzyka waits unti a category has several
additions or deletions before revising its planogram. In the meantime,
stores can adjust their shelves as they see fit until the new
planogram is issued. "Stores are more than  welcome to cut in a new
item
themselves," says Muzyka.
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The Apollo software ran on a small, 20 MHz Compaq 386 personal computer with a 500-megabyte hard drive. See, page 5, third paragraph.

Big Y Foods also used a category management tool called Spacemaster to allocate shelf space among product categories. *Id.* The manual combination of the two software packages is described by Garry on page 6:

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Muzyka uses Spacemaster as a supplement to Apollo. He uses
Apollo to generate planograms that allocate space within a category
(microanalysis), and Spacemaster to allocate space for multiple
categories
and the store as a whole (macroanalysis).
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Competing with Spacemaster for shelf allotment was the Wetterau HOPE system, described on page 7: "Divided into about 250 categories, products are ranked according to profitability and identified as fast, slow or average moving. The report also provides shelf allotments – the number of facing needed to coverage average movement and accommodate full case stocking." The HOPE system was designed NOT to be combined with planograms: "The merchandising report also includes shelf tags for each product … used by store personnel to set the section – no planograms, no computers, no muss, no fuss." *Id.*
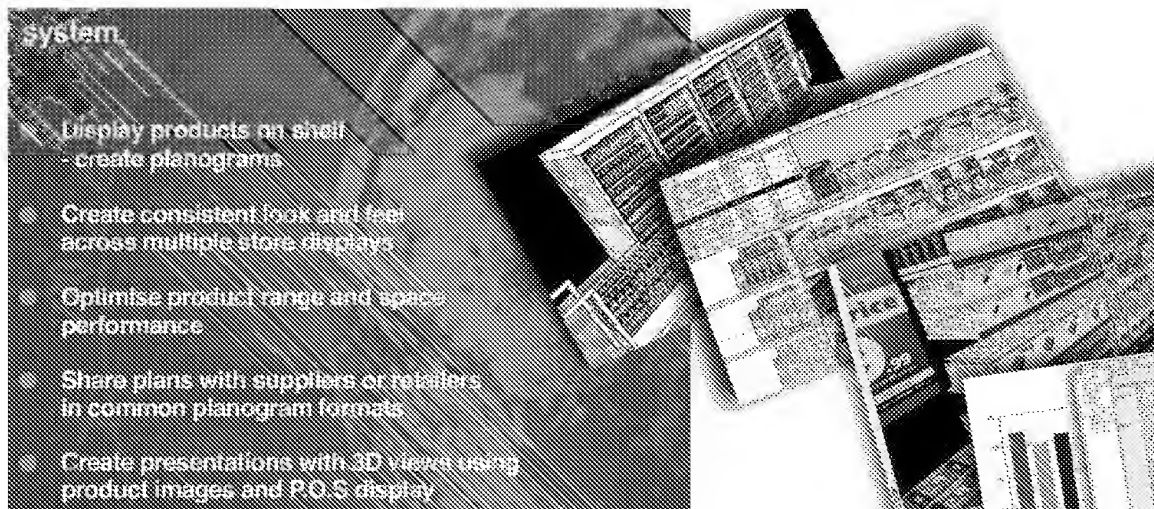
As evidence goes, a trial judge would not admit Garry into evidence, nor would any expert witness rely on it, because it is too vague and too rife with hearsay. Instead of attaching a product data sheet or reference manual that would tell us what the

product really does, Garry uses a few words to entice a retailer to contact the product vendor and find out more, which is what we did, using the Internet, for Apollo's planogram software.
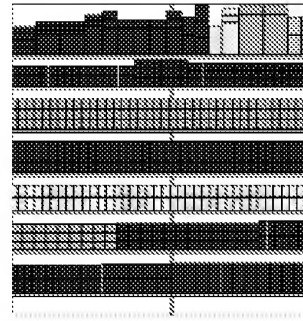
Apollo Planograms

The Apollo software is an Information Resources, Inc. ("IRI") product. *See,* http://usa.infores.com. Without registering on the IRI web site, we found a marketing partner, Retail Smart, from which we obtained what appear to be information sheets published in 2004 and 2007 (metadata indicates created on dates in 2004 and 2007, which we have annotated on individual pages) for seven Apollo software packages. The compendium from Retail Smart is submitted with an IDS, although some parts of the compendium appear to be created too late to qualify as prior art. The recommended system requirements for the software version 9.1 (much different from what Garry described) were 1GB of RAM and a 2.4+ GHZ processor, which would not be satisfied by the 20 mhz Compaq 386 computer that Garry referred to, circa 1990. Apollo, at 1, 5.

Even the 2007 version of Apollo's planogram software is shelf layout planning software, as depicted on page 21.

Given the apparent capabilities of Apollo's software 16 years after Garry's article, we need not speculate about how Apollo's planograms would be implemented by those of ordinary skill in the art. Common sense tells us to look at the product and see to what extent the long-felt need for shelf planning was satisfied using extensions of the Apollo software that Garry described close to two decades ago. Undoubtedly, if the Examiner

registers on the IRI web site, plentiful information about the Apollo planogram software will be available. What we see in the 12 pages submitted is pictures of shelf layouts, as Big Y Foods might use in a grocery store. *See*, e.g., p. 10 (in margin).

Having reviewed the new reference, we turn to the grounds of rejection.

Claim 94

Claim 94 includes the limitations:

eliciting from a first user a schedule of display fixtures, to be used in a plurality of stores having differing floor plans and storing the schedule in a data structure stored in computer readable memory, wherein the resulting schedule of named display fixtures includes

fixture identifiers for a plurality of fixture types;

capacities of the fixture types to hold items; and

names for instances of a fixture type, hereinafter "named display fixtures", used to present the items;

eliciting from a second user a store-by-store schedule of named display fixtures used in the stores, wherein the stores have varying floor plans;

eliciting from a third user a plan to stock the named display fixtures with items to be displayed, without requiring knowledge of the varying floor plans of the stores, and storing the resulting stocking plan in a data structure stored in computer readable memory, wherein the stocking plan for the named display fixtures includes

presentation quantities of items required and

dates during which the items will be displayed at particular stores;

modeling lead times with time elements, which collectively represent the overall lead time for an order or other action to lead to stocking of the named display fixtures at particular stores;

simulating sales of the items from the named display fixtures at the stores and calculating orders that would need to be placed for the items to accommodate the simulated sales, the order calculations using at least

the selected overall lead time,

the presentation dates and

the quantities; and

outputting the calculated orders.

These limitations are not found in Garry in view of Landvater.

This claimed method is generally in the same area of technology as Application No. 09/766,539, which stands allowed.

This claim was amended in the past based on suggestions from Examiner Boswell.

The newly cited article, Barry (OA at 3-6), which refers to planograms, does not, either by itself or in combination with Landvater, prove that one of ordinary skill in the art would have created the claimed invention without the use of hindsight. First, the new article should not be treated as evidence. It could lead to evidence, because it identifies planogram and space allocation software that was available in 1991, but it does not authoritatively prove how that software worked, as a manual or data sheet might. Fed. R. Evid. 1002 (Best Evidence Rule). Its descriptions of products should be excluded from consideration. Second, it is rife with hearsay upon hearsay, which is not entitled to evidentiary weight, even in administrative proceedings, when authoritative publications are, or should be, available. Third, the hearsay descriptions of the 1991 products available are too brief to enable one of skill in the art to reproduce the software mentioned. It is black letter law that references relied upon for a section 103 rejection must provide an enabling disclosure, i.e., they must place the claimed invention in the possession of the public. 1 Chisum on Patents § 3.04 [1][b][v] to [1][c]. Printed publications cited as prior art must be enabling. *In re Kumar*, 418 F.3d 1361, 1368, 76 U.S.P.Q2d (BNA) 1048 (Fed. Cir. 2005); *In re Epstein*, 32 F.3d 1559, 1568, 31 U.S.P.Q.2d (BNA) 1817 (Fed. Cir. 1994); Chisum, *supra, citing, In re Brown*, 329 F.2d 1006, 141 USPQ 245 (CCPA 1964); *In re Payne*, 606 F.2d 303, 314-15, 203 USPQ 245 (CCPA 1979) (References relied upon to support a rejection under 35 U.S.C. 103 must provide an enabling disclosure, i.e., they must place the claimed invention in the possession of the public ....") It is not plausible that the Examiner considers the brief description of Apollo's planogram software to be sufficient to enable one of ordinary skill in the art to reproduce what Barry describes.

The better evidence of record is the compendium of 2004 and 2007 information sheets that come closer to illustrating what Apollo's software actually does. It is fair to assume that the 2004 or 2007 version of Apollo's software included more features and

capabilities than the 1991 version, if only because it was running on a 2.4+ GHz Pentium processor instead of a 20 MHz 386 processor, a processor running more than 100 times as fast. The new version of the Apollo software (reserving the issue of whether or not it is prior art) does not read on the claim limitations because neither the abstraction of a named display fixture nor the capability of loading named display fixtures that may occupy different floor locations in different stores is not evident.

Garry clearly describes a long-felt general need in the industry, without describing the more particular need that this application identifies. The Court in *KSR* clearly reiterated from *Graham* that long-felt need is proof of non-obviousness. It is plain from Myzyak's description of the tedious manual steps that Big Y Foods needed to take to prepare store-specific planograms that Apollo's 1991 software, even if proven, would not read on claim 1. Garry's description of retailers needing to hire extra planners to do what Myzyak did is a poignant description of the state of the art and failure in 1991 to meet the long felt need. The Apollo brochures from 2004 and 2007 make it equally plain that those of ordinary skill in the art did not see the software that Barry described as leading to the claimed technology – despite 16 years of evolution, the Apollo 2004/2007 planogram software did not gain the claimed features. It is common sense, based on the actual evolution of software over 16 years, that neither Barry's article from 1991, which should not be given any evidentiary weight, nor the software that we could speculate existed in 1991, should be taken as leading one of ordinary skill in the art, without the use of hindsight, to create what Applicants have claimed.

At a practical level, Applicants suggest that this claim should be allowed, given its similarities to claims allowed in application 09/766,539.

Applicants request an interview to put this claim in condition for allowance, if the Examiner considers it to be in need of amendments.

Therefore, claim 94 should be allowable over Garry in view of Landvater.

Claim 26

Claim 26 includes the limitations:

for the items to be displayed, designating whether or not a quantity of the item at the store should be allowed to fall below the presentation quantity between deliveries.

These limitations are not found in Garry in view of Landvater.

The mention of a "slush factor" in Garry (OA at 6) is not enabling of an analytical configuration parameter that determines how a simulation should be conducted. Moreover, the "slush factor" is applied to a space allocation program, rather than the Apollo planogram on which much of the Examiner's argument rests. There is no rational basis given (OA at 6) for Landvater to import the "slush factor" for space allocation into any of the technology that Landvater describes. As for combining the "slush factor" with Apollo, Barry describes the manual combination of Apollo's planogram with space allocation that was being used by those of ordinary skill in the art in 1991, and it does not read on claim 26.

The Examiner previously acquiesced in our position that Landvater does not read on this limitation. *Compare, 2007-08-06 Response to Office Action*, at 22.

Therefore, claim 26 should be allowable over Garry in view of Landvater.

Claims 27-29

Claims 27-29 include the limitations:

wherein the time elements include delivery of the item from a stocking location.

wherein the time elements include preparing the delivered item for sale.

wherein the time elements include time required to collect data, review action recommendations, process data, pick goods at a stocking location, and ship the item to the store.

These limitations are not found in Garry in view of Landvater.

We previously have explained how Landvater, on which the Examiner relies (OA at 6) lacks these elements. *2007-08-06 Response to Office Action*, at 23-24. We incorporate by reference our prior arguments.

Therefore, claims 27-29 should be allowable over Garry in view of Landvater.

Claims 30 and 35

Claims 30 and 35 should be allowable over Garry in view of Landvater for at least the same reasons as the claims from which they depend.

Claims 31-34

Claims 31-34 include the limitations:

wherein the time elements include time for distributing the item from one or more first level stocking locations to a plurality of second level stocking locations.

wherein the time elements include time for distributing the item from one or more first level stocking locations to a plurality of second level stocking locations.

wherein the time elements include time for distributing the item from a supplier through one or more stocking locations to a plurality of stores.

wherein the time elements include time for distributing the item from a supplier through one or more stocking locations to a plurality of stores.

These limitations are not found in Garry in view of Landvater.

We previously have explained how Landvater, on which the Examiner relies (OA at 6) lacks these elements. *2007-08-06 Response to Office Action*, at 23-24. We incorporate by reference our prior arguments.

Therefore, claims 30-34 should be allowable over Garry in view of Landvater.

Claim 37

Claim 37 includes the limitations:

wherein the action includes allocating delivery of the item after ordering from a supplier.

These limitations are not found in Garry in view of Landvater.

For claim 37, we disclaim "or other action" as making the "other action" optional. (compare OA at 8) One of ordinary skill in the art understands that it takes more than just an order to make a item available in a store, so it is not reasonable to interpret these claims as broadly as the Examiner has. (OA at 8) If it ever was, it is not any longer a reasonable interpretation of claim 37 that the "other action" is optional.

Moreover, we previously took this position that Landvater does not include this detail of retail mechandising (*2007-08-06 Response to Office Action*, at 24) and the Examiner does not reassert her former argument.

Therefore, claims 35 and 37 should be allowable over Garry in view of Landvater.

Claim 40

Claim 40 includes the limitations:

wherein the simulating includes adding the presentation quantities and the simulated sales for the item at the stores.

These limitations are not found in Garry in view of Landvater.

We previously have explained how Landvater, on which the Examiner relies (OA at 6) lacks these elements. *2007-08-06 Response to Office Action*, at 25-26. We incorporate by reference our prior arguments.

Therefore, claim 40 should be allowable over Garry in view of Landvater.

Claims 41-44 and 46

Claims 41-44 and 46 include the limitations:

*further including selecting among a plurality of available approaches to calculating the presentation quantity, wherein the approach selected uses an **average presentation quantity** for the location **during the predetermined selling period**.*

*further including selecting among a plurality of available approaches to calculating the presentation quantity, wherein the approach selected uses a presentation quantity for the selling location on the **first day of the predetermined selling period**.*

*further including selecting among a plurality of available approaches to calculating the presentation quantity, wherein the approach selected uses a presentation quantity on **the day** of the predetermined selling period **when the item is received** at the selling location.*

*further including selecting among a plurality of available approaches to calculating the presentation quantity, wherein the approach selected uses a **largest presentation quantity** associated with the item at the selling location **for any day of the predetermined selling period**.*

*wherein the presentation quantity used is the presentation quantity for the selling location on the **last day of the predetermined selling period**.*

These limitations are not found in Garry in view of Landvater.

We previously have explained how Landvater, on which the Examiner relies (OA at 6) lacks these elements. *2007-08-06 Response to Office Action*, at 28. We incorporate by reference our prior arguments.

Therefore, claims 41- 44 and 46 should be allowable over Garry in view of Landvater.

Claim 45

Claim 45 includes the limitations:

selecting the larger of the presentation quantities or the simulated sales for the item at the stores.

These limitations are not found in Garry in view of Landvater.

Landvater always uses both the presentation quantity (as a threshold) and the projected demand (to reduce the quantity on hand.) There is no suggestion in cols. 14-15 of selecting between the two.

Therefore, claim 45 should be allowable over Garry in view of Landvater.

Applicants respectfully submit that claims 26-35, 37, 40-46, and 94 should be allowable over Garry in view of Landvater.

CONCLUSION

Applicants respectfully submit that the pending claims are now in condition for allowance and thereby solicit acceptance of the claims as now stated.

Applicants would welcome an interview, if the Examiner is so inclined. The undersigned can ordinarily be reached at his office at (650) 712-0340 from 8:30 a.m. to 5:30 p.m. PST, Monday through Friday, and can be reached at his cell phone at (415) 902-6112 most other times.

Fee Authorization. The Commissioner is hereby authorized to charge underpayment of any additional fees or credit any overpayment associated with this communication to Deposit Account No. 50-0869 (BLFR 1001-1).

Respectfully submitted,

Dated: 22 December 2008   /Ernest J. Beffel, Jr./
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